

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 JAN 12 P 3:04

BY RONALD R. CARPENTER

No. 80888-1

CLERK

WASHINGTON STATE SUPREME COURT

KIMME PUTMAN,

Appellant,

v.

WENATCHEE VALLEY MEDICAL CENTER, P.S., a Washington
professional service corporation; PATRICK J. WENDT, M.D.;
DAVID B. LEVITSKY, M.D.; SHAWN C. KELLEY, M.D.; and
JOHN DOE NO. 1; JOHN DOE NO. 2; JANE DOE NO. 1;
and JANE DOE NO. 2,

Respondents.

On Appeal from Chelan County Superior Court,
No. 07-2-00060-1
Honorable John E. Bridges

**APPELLANT PUTMAN'S CORRECTED REPLY TO
RESPONDENTS' SUPPLEMENTAL BRIEF**

Ron Perey, WSBA #2275
Carla Tachau Lawrence, WSBA #14120
PEREY LAW GROUP, PLLC
1606 Eighth Avenue North
Seattle, Washington 98109
206.443.7600 (telephone)
206.443.4785 (facsimile)

Robert S. Peck
Granted limited admission
CENTER FOR CONSTITUTIONAL
LITIGATION, PC
777 Sixth Street, N.W., Suite 520
Washington, DC 20001-3723
202.944.2874 (telephone)
202.965.0920 (facsimile)

Attorneys for Appellant Kimme Putman

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. RCW 7.70.150 COMPRISES AN UNCONSTITUTIONAL SPECIAL LAW	1
II. SECTION 28(10) APPLIES AND MANDATES INVALIDATION OF RCW 7.70.150	3

TABLE OF AUTHORITIES

Cases

<i>Cordall v. State ex rel. Departments of Veterans Affairs and Social & Health Services</i> , 96 Wn. App. 415, 980 P.2d 253 (Div. 2 1999)	4
<i>Equitable Shipyards, Inc. v. State by and through Department of Transportation</i> , 93 Wn.2d 465, 611 P.2d 396 (1980).....	2
<i>Port of Seattle v. Pollution Control Hearings Board</i> , 151 Wn.2d 568, 90 P.3d 659 (2004).....	2
<i>State ex rel. Collier v. Yelle</i> , 9 Wn.2d 317, 115 P.2d 373 (1941).....	2, 5
<i>YMCA of Seattle v. Parish</i> , 89 Wn. 495, 154 P. 785 (1916).....	2

Constitutional Provisions

Const. art. II, § 28	2, 3, 5
----------------------------	---------

Statutes

42 U.S.C. § 1396a.....	3, 4
42 U.S.C. § 1396k.....	4
RCW 43.20B.060.....	4
RCW 7.70.150	1, 5
RCW 74.09.180	4
S. Rep. No. 90 744, 1967 U.S.C.C.A.N. 2834:.....	3, 4

Regulations

42 C.F.R. § 433.136.....	4
--------------------------	---

Other Authorities

- Ireland, Robert M., *The Problem of Local, Private, and Special Legislation in Nineteenth-Century United States*, 46 AM. J. OF LEGAL HISTORY 271 (2004) 2
- U.S. Department of Health & Human Services, *2004 TPL Collections*, available at <http://www.cms.hhs.gov/ThirdPartyLiability/> (last visited Jan. 8, 2009) 4
- Willard, James Hurst, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950) 1
- Yudof, Mark G., *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366 (1990) 2

ARGUMENT

I. RCW 7.70.150 COMPRISES AN UNCONSTITUTIONAL SPECIAL LAW

In her opening brief, Ms. Putman asserted that the certification requirement codified at RCW 7.70.150 constitutes a special law that unconstitutionally favors medical malpractice defendants over all other negligence defendants. App. Corrected Opening Br. 47-50. Respondent Wenatchee Valley Medical Center does not dispute the fact that the requirement operates in precisely such a favorable manner. Nor does WVMC dispute that the prohibition on special laws was designed to prevent the legislature from enacting laws that benefit solely those with the wherewithal to press for special favors. That is a given. As one scholar has noted, “prohibitions on the enactment of special and local legislation” were “written into state constitutions after the 1840’s . . . to curb special privilege.” James Willard Hurst, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 241-42 (1950). Adoption of the prohibitions codified the venerable principle articulated by John Locke that “those who legislate ‘are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at the plough.’” Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1374

(1990) (footnote omitted). Thus, Washington, joining the majority of sister states,¹ adopted Article II, section 28 of the Washington Constitution, which this Court authoritatively construed to “prohibit[] the legislature from enacting any private or special laws that grant corporate powers or privileges, legalize an unauthorized or invalid act of a state officer, *or limit civil or criminal actions.*” *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 627, 90 P.3d 659 (2004) (emphasis added). It is intended “to protect the people of the state as a whole from legislative favoritism of an individual or a group.” *State ex rel. Collier v. Yelle*, 9 Wn.2d 317, 331, 115 P.2d 373 (1941).

A special law “arbitrarily separates some person, place or thing from those upon which it would otherwise operate.” *Equitable Shipyards, Inc. v. State by and through Dep’t of Transp.*, 93 Wn.2d 465, 479, 611 P.2d 396 (1980). The inquiry focuses “upon what the law excludes.” *Id.* (citing *YMCA of Seattle v. Parish*, 89 Wn. 495, 154 P. 785 (1916)). The certificate of merit requirement is arbitrarily imposed on medical malpractice plaintiffs but not required for any other professional malpractice or personal injury action, even complex civil actions. It does not apply to defenses or counterclaims asserted by defendants. App. Br. 47-48.

¹ Robert M. Ireland, The Problem of Local, Private, and Special Legislation in Nineteenth-Century United States, 46 Am. J. of Legal History 271, 271 (2004) (“most states by the end of the nineteenth century or the early twentieth prohibited or restricted much of the special legislation that had routinely been enacted by legislature.”).

II. SECTION 28(10) MANDATES INVALIDATION OF RCW 7.70.150

Ms. Putman, while resting her special-law claim on the prohibition of Section 28 as a whole, noted the applicability of Section 28(10) on reply. WVMC asserts that section is inapplicable because (1) no obligation is “owed to the state or any municipal corporation” and (2) the certificate requirement “does not release or extinguish any liability that respondent might have.” WVMC ignores the fact that the state typically makes Medicaid payments to cover medical expenses of eligible individuals in connection with injuries received in tort – and has made such payments in this instance.² Both federal and state law mandate the recovery of those payments from liable third parties. Specifically, the Federal Medicaid Act requires state and local Medicaid agencies to “take all reasonable measures to ascertain the legal liabilities of third parties to pay for care and services [arising out of injury, disease, or disability]” and to “seek reimbursement for such assistance to the extent of such legal liability.” 42 U.S.C. § 1396a(a)(25)(A), (B). The requirement was added to the Act to “make certain that the State and the Federal Governments will receive proper reimbursement for medical assistance paid to an eligible person when such third part liability exists.” S. Rep. No. 90 744, *reprinted in* 1967 U.S.C.C.A.N. 2834, 3022. In enacting the provision, Congress found

²WVMC received proper notice that DSHS has a lien of \$31,213.04 against any recovery here to offset its expenditure. *See* Attachments A&B.

that “many people need medical care because of an accident or illness for which someone else has fiscal responsibility.” *Id.*

States receive federal Medicaid funds only after submitting a plan, subject to federal approval, that pledges compliance with all applicable rules and regulations. *Cordall v. State ex rel. Dep’t of Veterans Affairs and Soc. & Health Servs.*, 96 Wn. App. 415, 423, 980 P.2d 253 (1999). The plan must obligate the state to identify third parties who may be responsible for a portion of an individual’s services paid by Medicaid. 42 U.S.C. § 1396a(a)(25). Such third parties include “any individual, entity or program that is or may be liable to pay all or part of the expenditures for medical assistance furnished under a State plan.” 42 C.F.R. § 433.136. The State *must* collect funds from any third party otherwise legally liable. *See* 42 U.S.C. § 1396k; RCW 74.09.180. In fact, RCW 43.20B.060(2) gives the state a lien on any recovery by or on behalf of the recipient from a tortfeasor, its insurer, or both, for the assistance paid. An example of the offset’s importance to the State’s fiscal health is \$39.5 million third-party reimbursement in Washington in 2004. U.S. Dep’t of Health & Human Serv., *2004 TPL Collections*, downloaded from <http://www.cms.hhs.gov/ThirdPartyLiability/> (last visited Jan. 8, 2009). Anything that effectively reduces Medicaid reimbursement rates, a major part of the state budget, from liable third parties disadvantages the state and its taxpayers.

RCW 7.70.150 operates to extinguish a cause of action against defendants merely because the plaintiff lacks sufficient pre-discovery information to enable a medical professional willingly to attest to a reasonable probability that the medical care departed from the applicable standards. That effect extinguishes an obligation due the state by operation of the Medicaid recoupment statutes and regulations. Section 28(10) fully contemplates that extinguished obligation; it is “not limited to tax obligations.” *Yelle*, 9 Wn.2d at 330. Instead, it

applies to all ‘indebtedness, liability, or other obligation.’ It is one of eighteen constitutional prohibitions against special legislation, all of which tend to protect the people of the state as a whole from legislative favoritism of an individual or a group.

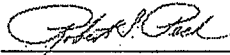
Id. at 331. Since Ms. Putman filed certificates of merit as to two physicians, her claim is not frivolous. That a similar certificate could not be obtained against the clinic or “each and every individual” employee or agent “whose conduct forms the basis of the vicarious liability claim”, CP 58 (Letter Opin., at 7), does not absolve WVMC or render Ms. Putman’s vicarious liability claim less than meritorious. But the court’s dismissal extinguishes WVMC’s vicarious liability and, in turn, the state’s recoupment of Medicaid expenses. It will operate that way in every case in which Medicaid payments figure. Consequently, RCW 7.70.150 violates the prohibition on special laws and should be declared null and void.

Dated: January 12, 2009

Respectfully Submitted,



Ron Perey, WSBA #2275
Carla Tachau Lawrence, WSBA #14120
PEREY LAW GROUP, PLLC
1606 Eighth Avenue North
Seattle, Washington 98109
206.443.7600 (telephone)
206.443.4785 (facsimile)



Robert S. Peck
Granted Limited Admission
CENTER FOR CONSTITUTIONAL
LITIGATION, P.C.
777 Sixth Street, N.W., Suite 520
Washington, DC 20001-3723
202.944.2874 (telephone)
202.965.0920 (facsimile)

Attorneys for Appellant Kimme Putman

ATTACHMENT A

Department of Social and Health Services, Statement of Lien

COPY
THE ORIGINAL OF THIS LIEN HAS
BEEN FORWARDED FOR FILING BY
THE COUNTY AUDITOR

RETURN:
Department of Social and Health Services
Medical Assistance Administration Casualty Unit
P.O. Box 45561 Olympia, WA 98504-5561
Fax: (360) 753-3077
1-800-894-3754 Ext: 51205

THIS LIEN DOES NOT AFFECT REAL PROPERTY

STATEMENT OF LIEN

Grantor/Debtor: WENATCHEE VALLEY MEDICAL CENTER; DAVID LEVITSKY MD; PATRICK WENDT MD
Grantee/Creditor: DSHS and KIMME A PUTMAN
Date of injury: 03/01/2001

Notice is hereby given that the State of Washington, Department of Social and Health Services, has rendered assistance or provided residential care to KIMME A PUTMAN, a person who was injured on or about the 1st day of March, 2001, in the County of Chelan, State of Washington, and the said Department hereby asserts a lien, to the extent provided in RCW 43.20B.060, for the amount of such assistance or residential care, upon any sum due and owing KIMME A PUTMAN from WENATCHEE VALLEY MEDICAL CENTER; DAVID LEVITSKY MD; PATRICK WENDT MD, alleged to have caused the injury, and/or his or her insurer and from any other person or insurer liable for the injury or obligated to compensate the injured person on account of such injuries by contract or otherwise.

STATE OF WASHINGTON)
)ss.
COUNTY OF THURSTON)

DEPARTMENT OF SOCIAL AND HEALTH SERVICES

Theresa Shiner

Theresa Shriner, Medical Assistance Specialist

I, Theresa Shriner, being first duly sworn on oath, state: That I am a Medical Assistance Specialist; that I have read the foregoing Statement of Lien, know the contents thereof, and believe the same to be true.

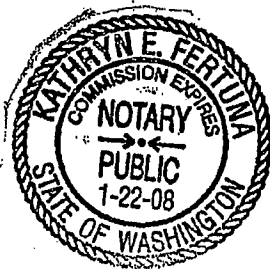
Theresa Shiner

Theresa Shriner, Medical Assistance Specialist

SIGNED AND SWORN TO OR AFFIRMED before me this 14th day of September, 2007 by Theresa Shriner.

Kathryn Fisher

NOTARY PUBLIC IN and for the State of Washington
My appointment expires January 22, 2008



ATTACHMENT B

**Department of Social and Health Services,
September 5, 2008, Letter re: Lien**



STATE OF WASHINGTON
DEPARTMENT OF SOCIAL AND HEALTH SERVICES
HEALTH AND RECOVERY SERVICES ADMINISTRATION
COORDINATION OF BENEFITS, CASUALTY SECTION
PO Box 45561, Olympia, WA 98504-5561
Fax: (360)-753-3077

September 5, 2008

Douglas Weinmaster
Attorney at Law
1606 8th Ave. N.
Seattle, WA 98109-3006

RE: PUTMAN, Kimme A.
ID#: KA 110761 PUTMA A
File#: 205724
DOI: 03/01/01.

Dear Mr. Weinmaster:

This agency is still holding a statutory lien claim in the amount of \$31,213.04 for medical payments made on behalf of the above.

Please inform me of the current status of this case and indicate below:

Litigation Court: _____
Cause Number: _____
Mediation Date: _____ Arbitration Date: _____ Trial Date: _____

- ☐ Case pending
- ☐ Withdrawn from representation, please indicate name and telephone number of new attorney if known. Also, please provide name, address, policy and/or claim number of insurance company responsible for this incident.
- ☐ Case settled on _____ (date). Please forward a copy of the disbursement of settlement funds to this office. Pursuant to RCW 43.20B.050 "No settlement made by and between the recipient and tortfeasor and/or insurer shall discharge or otherwise compromise the lien created in RCW 43.20B.060 without the express written consent of the secretary".
- ☐ Case was lost and/or dismissed through court/arbitration/mediation
(Please attach appropriate documents.)

Your cooperation will be appreciated.

Sincerely,

T. Shriner

Theresa Shriner, Medical Assistance Specialist
Toll Free: 1-800-894-3754 Ext: 51205
E-Mail: shrind@dshs.wa.gov

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 JAN 12 P 3:04

PROOF OF SERVICE

I certify that on January 12th, 2009, I sent **APPELLANT**

PUTMAN'S CORRECTED REPLY TO RESPONDENTS' SUPPLEMENTAL

MENTAL BRIEF to the following attorneys via legal messenger:

Pamela Okano, Esq., WSBA #7718
Michael Budelsky, Esq., WSBA #35212
REED MCCLURE
601 Union Street, Suite 1500
Seattle, WA 98101-1363

Sherry H. Rogers, Esq., WSBA #16844
LEE SMART, P.S., INC.
701 Pike Street, Suite 1800
Seattle, WA 98101

DATED this 12th day of January, 2009.

PEREY LAW GROUP, PLLC



Sara Farris, Paralegal
1606 Eighth Avenue North
Seattle, WA 98109
(206) 443-7600

OFFICE RECEPTIONIST, CLERK

To: Sara Farris
Cc: 'Okano, Pamela'; 'Budelsky, Michael'; shr@leesmart.com
Subject: RE: Filing in Case No. 80888-1

Rec. 1-12-09

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sara Farris [mailto:sfarris@pereylaw.com]
Sent: Monday, January 12, 2009 3:03 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Okano, Pamela'; 'Budelsky, Michael'; shr@leesmart.com
Subject: Filing in Case No. 80888-1

Please file the attached document with the Court. The document is a corrected version of appellant's reply brief filed on Friday, January 9, 2009. The corrected brief has been shortened to fit within the Court's specified 5 page limit. Thank you.

Case: *Putman v. Wenatchee Valley Medical Center, P.S., et al.*
Case No.: 80888-1
Document: Appellant Putman's Corrected Reply to Respondents' Supplemental Brief

Sara Farris

PEREY LAW GROUP, PLLC
1606 Eighth Avenue North
Seattle, WA 98109
Tel: (206) 443-7600
Fax: (206) 443-4785
sfarris@pereylaw.com